**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

**EARL COFIELD, et al. ***

**Plaintiffs ***

**vs. * CIVIL ACTION NO. MJG-99-3277**

**LEAD INDUSTRIES ASSOCIATION, INC., et al. ***

**Defendants**

*** * * * * * * * ***

**MEMORANDUM AND ORDER RE MOTIONS TO DISMISS COUNTS I, III, IV, VI, VII and VIII**

**The Court has before it several Motions[1] which seek dismissal of Counts I, III, IV, VI, VII and VIII of the Plaintiffs' First Amended Complaint and the materials submitted by the parties relating thereto. The Court has held a hearing and has had the benefit of the arguments of counsel.**

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**[1]The Motions are: the Motion to Dismiss filed by Defendants Atlantic Richfield Company, Lead Industries Association, Inc., NL Industries, Inc., National Paint and Coatings Association, The Sherwin-Williams Company, SCM Corporation, The Glidden Company, E.I. DuPont de Nemours and Company, Fuller-O'Brien Corporation (sued as Fuller-O'Brien), American Cyanamid Company, Asarco, Inc., The Doe Run Resources Corporation (sued as St. Joe Minerals Corporation), PPG Industries, Inc. and Bruning Paint Company [Paper No. 24]; PPG Industries' Motion to Dismiss [Paper No. 26]; and Ethyl Corporation's Motion to Dismiss [Paper No. 27].**

## I. BACKGROUND

Plaintiffs filed this lawsuit against various trade associations and lead-related corporations on behalf of a proposed class of all persons who own and occupy single-family residential dwelling units situated within the State of Maryland which were constructed no later than 1978 and which either did or do contain lead paint. Plaintiffs claim that their homes are contaminated and diminished in value by lead paint which is, or was, present on the interior and exterior of the properties.

Plaintiffs further allege that beginning in the 1920s, Defendants marketed and advertised paint containing lead pigment for use in locations and environments routinely occupied by children. Plaintiffs allege that by 1958, Defendants had actual knowledge of the dangers associated with lead, and that Defendants engaged in conscious and targeted efforts to conceal the hazards associated with lead pigment from the American public.

Plaintiffs seek monetary damages and declaratory and equitable relief in connection with the abatement of the lead paint hazard in their homes. Plaintiffs assert the following claims:

COUNT I Negligent Product Design

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| **COUNT II** | **Negligent Failure to Warn** |
| **COUNT III** | **Supplier Negligence** |
| **COUNT IV** | **Strict Products Liability/Defective Design** |
| **COUNT V** | **Strict Products Liability/Failure to Warn** |
| **COUNT VI** | **Nuisance** |
| **COUNT VII** | **Indemnification** |
| **COUNT VIII** | **Fraud and Deceit** |
| **COUNT IX** | **Conspiracy** |
| **COUNT X** | **Concert of Action** |
| **COUNT XI** | **Aiding and Abetting** |
| **COUNT XII** | **Enterprise Liability** |

**In the Motions which are the subject of the instant Memorandum and Order, Defendants seek dismissal of Counts I, III, IV,[2] VI, VII and VIII of the First Amended Complaint.**

## II. LEGAL STANDARD

**The Court must deny a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure unless it "appears beyond doubt that Plaintiff can prove no set of facts**

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**[2]As to Counts I, III and IV, Defendants only seek dismissal of the claims insofar as they relate to lead pigment as opposed to lead paint.**

in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957). "The question is whether in the light most favorable to the Plaintiff, and with every doubt resolved in his behalf, the Complaint states any valid claim for relief." Wright & Miller, Federal Practice and Procedure: Civil 2d, § 1357, at 336. The Court, when deciding a motion to dismiss, must consider well-pled allegations in a complaint as true and must construe those allegations in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969). The Court must further disregard the contrary allegations of the opposing party. A.S. Abell Co. v. Chell, 412 F.2d 712, 715 (4th Cir. 1969).

## III. DISCUSSION

### A. Products Liability Claims - Counts I and IV

Plaintiffs seek relief under a products liability theory for negligent product design (Count I) and strict liability (Count IV). In order to recover under a strict liability theory, Plaintiffs must show that:

(1) The product was in a defective condition at the time it left the possession or control of the seller;

(2) The product was unreasonably dangerous to the user or consumer;

(3) The product was expected to and did reach the user or consumer without substantial change in its condition; and

(4) The defect was the cause of his injuries.

Kelley v. R.G. Industries, Inc., 497 A.2d 1143 (Md. 1985). The elements of a negligence action in the products liability context are essentially the same, except that in a negligence action the plaintiff must show a breach of a duty of care by the defendant, while in a strict liability context the plaintiff must show that the product was unreasonably dangerous. Polansky v. Ryobi America Corp., 760 F. Supp. 85, 87 (D. Md. 1991) (applying Maryland law). The presence of a defect in the product is a necessary prerequisite to recovery under either theory, and may be proven by showing a defect in the manufacturing process, a defect in design, or that the product is inherently defective due to an extremely high level of dangerousness.

Defendants argue that Plaintiffs' product liability claims are barred insofar as the claims relate to lead pigment because of Plaintiffs' inability to adequately plead the presence of a defect in lead pigment. Plaintiffs argue that their First Amended Complaint adequately pleads a design

**defect in lead pigment, or in the alternative, that lead pigment is an inherently defective product.**

**Plaintiffs' First Amended Complaint alleges that the incorporation of lead into pigments and the Defendants' failure to incorporate safe and effective alternatives renders lead pigment defective and unreasonably dangerous. See First Am. Compl. at p. 105 ¶¶ 290-91. Plaintiffs allege that "there existed safe and effective alternatives to lead pigment, such as zinc and titanium pigments, which were technologically and commercially feasible for use in paint." Id. at p. 58-62 ¶¶ 152-68, p. 110 ¶ 317. The Court must consider whether these allegations are sufficient to establish the presence of a design defect under Maryland law.**

**A products liability claim requires a plaintiff to plead and prove the presence of a safer, commercially reasonable, alternative. See Nissan Motor Co., Ltd. v. Nave, 740 A.2d 102 (Md. Ct. Spec. App. 1999); Nicholson v. Yamaha Motor Co., Ltd., 566 A.2d 135, 147 (Md. Ct. Spec. App. 1990). Under Maryland law, a product cannot be defective because of a characteristic that is inherent in the product itself. See**

**Dudley v. Baltimore Gas & Elec. Co., 632 A.2d 492, 502 (Md. Ct. Spec. App. 1993).[3]**

**Plaintiffs have attempted to plead the presence of a safer alternative to lead pigment by referring to the availability of zinc and titanium for use in pigment production. First Am. Compl. at p. 58-62 ¶¶ 152-168, p. 110 ¶ 317. However, even viewing the First Amended Complaint in the light most favorable to the Plaintiffs, it does nothing more than allege that Defendants should not have produced lead pigment at all, and should have instead produced zinc or titanium pigments.**

**Several courts have considered the question of whether a design defect can be alleged as to lead pigment. Each of them has answered the question in the negative. Most recently, a New York trial court rejected products liability claims**

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**[3]In Dudley, the Maryland Court of Special Appeals rejected the plaintiff's argument that natural gas was defective because it is flammable and highly explosive. 632 A.2d at 502. The Dudley court stated that "[t]o claim that the gas supplied by BG&E was defective and unreasonably dangerous because it is flammable and highly explosive is equivalent to asserting that a kitchen knife is defective and unreasonably dangerous because it is sharp and can cut things." Id. Plaintiffs' attempt to distinguish Dudley on the basis that "natural gas is supposed to explode and catch fire," while lead pigment "is a surface coating, not [] a residential contaminant" is unavailing. People certainly do not purchase natural gas so that their homes will catch fire, rather they purchase it for use as heating and cooking fuel.**

brought against lead manufacturers where the plaintiffs' complaint alleged that the defendants should have produced only pigments other than lead pigments. Sabater v Lead Industries Assoc., Inc., 704 N.Y.S.2d 800, 804 (N.Y. Sup. Ct. 2000).

In Wright v. Lead Industries Assoc., Inc.,[4] Judge Heller of the Baltimore City Circuit Court stated that there can be no design defect in lead pigment, as lead is intrinsic to its nature. Circuit Court Slip Op. at 8. The Maryland Court of Special Appeals affirmed, concluding that "[l]ead is the very essence of lead pigment." Court of Special Appeals Slip Op. at 13. Plaintiffs attempt to distinguish Wright by arguing that there was no allegation there, as there is here, that the defendants could have produced a safer alternative. The Court finds this argument to be meritless. Perhaps Plaintiffs might have been able to plead an adequate design defect claim as to lead pigment. However, even viewing the First Amended Complaint liberally in Plaintiffs' favor, the allegations are inadequate to establish a defect. The First Amended Complaint's allegations concerning the lead pigment

[4]Case Nos 94363042/CL190487, 94363943/CL190488, slip op. (Cir. Ct. Balto. City July 6, 1995) ("Circuit Court Slip Op."), aff'd Case No. 1896, slip op. (Md. Ct. Spec. App. Oct. 21, 1997) ("Court of Special Appeals Slip Op.").

manufacturing process describe the processing of lead, and confirm Judge Heller's statement that lead pigment is "essentially a processed lump of lead." Wright, Circuit Court Slip Op. at 8; see First Am. Compl. at p. 34-36 ¶¶ 75-84.

In City of Philadelphia v. Lead Industries Assoc, Civ. Ac. No. 90-7064, 1992 WL 98482 (E.D. Pa. April 23, 1992), the plaintiffs claimed, as do the Plaintiffs in this action, that defendants should have produced "non-toxic pigments, such as zinc oxide, [which] were available as commercial substitutes for lead pigments." Id. at *3. Judge Giles rejected the plaintiffs' contention that this allegation was sufficient to plead a design defect claim, and concluded that the challenge "was to the product itself, not to its specific design." Id.

The Court finds the reasoning of these decisions persuasive, and concludes that they are entirely consistent with relevant Maryland law. The First Amended Complaint contains allegations which are substantially similar to those considered by the Judges who decided Sabater, Wright and City of Philadelphia. Accordingly, the Court concludes that the First Amended Complaint fails to adequately plead the presence of a design defect in lead pigment.

As Plaintiffs point out, Maryland recognizes certain "kinds of conditions which, whether caused by design or

manufacture," are inherently defective." Phipps v. General Motors Corp., 363 A.2d 955, 959 (Md. 1976). Plaintiffs argue that lead pigment fits within this category. In Phipps, the Maryland Court of Appeals set forth several examples of products which might fit into this category, including a steering mechanism that would cause a car to swerve off the road, a drive shaft of a vehicle that would separate from the car when driven in a normal fashion, brakes which would suddenly fail, and an accelerator of a new automobile which would stick without warning, causing the vehicle suddenly to accelerate. Id.

The Court has found some Maryland decisions which address the issue of whether a product is inherently defective. In order for a product to fit within the inherently defective category, the Maryland courts appear to require either that a product fail to function as the manufacturer intended, Ziegler v. Kawasaki Heavy Industries, 539 A.2d 613, 621 (Md. Ct. Spec. App. 1988), or that the alleged tortfeasor be an owner or occupier of land. Kelley, 497 A.2d at 1147; see Brown & Williamson Tobacco Corp., 973 F. Supp. 539, 549 (D. Md. 1997). Plaintiffs present neither of these situations. Absent any indication that the Maryland courts would expand the inherently defective category beyond these two circumstances,

lead pigment cannot be considered inherently defective under Maryland law. Wright, Court of Special Appeals Slip Op. at 13; Wright, Circuit Court Slip Op. at 8; see also, German v. Federal Home Loan Mortgage Corp., 885 F. Supp. 537, 570 (S.D.N.Y. 1995); Steinhoff v. Woodward, No. 549302, 1999 WL 608665 at *4 (Conn. Super. Ct. Aug. 5, 1999).

In sum, the Court concludes that Plaintiffs' First Amended Complaint fails to adequately allege the presence of a defect in lead pigment. Consequently, the Defendants are entitled to dismissal of Counts I and IV insofar as they relate to lead pigment. Plaintiffs' product liability claims for negligence and strict liability based upon lead paint remain pending.

B. Supplier Negligence - Count III

Plaintiffs' supplier negligence action is based on Section 389 of the Restatement (Second) of Torts. Restatement (Second) of Torts § 389 provides that:

> One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel of whose knowledge thereof does not make them contributorily negligent, although the supplier

> has informed the other for whose use the chattel is supplied of its dangerous character.

Defendants assert that Plaintiffs' supplier negligence claim fails because Plaintiffs have failed to allege the presence of a defect in lead pigment. Moreover, Defendants urge that because no Maryland court appears to have applied this section to impose liability on a supplier of a chattel, see Vance v. Willie, 395 A.2d 492, 494-95 (Md. 1978), no such cause of action exists in Maryland.

Defendants provide no basis for their contention that a defect is a necessary prerequisite to recovery under section 389. The plain language of section 389 refers to a product that is "unlikely to be made reasonably safe," and does not use the words "defect" or "unreasonably dangerous." Additionally, in the most recent case applying section 389, Buckingham v. R.J. Reynolds Tobacco-Co., 713 A.2d 381 (N.H. 1998), the New Hampshire Supreme Court dismissed the plaintiff's products liability claim for failure to plead a defect while allowing the section 389 claim to stand. Accordingly, the Court concludes that section 389 does not require a plaintiff to plead and prove the presence of a defect in the product. Moreover, a review of the Plaintiffs' First Amended Complaint discloses sufficient allegations to

**support a cause of action based on the principles outlined in section 389.**

**As an alternative basis for dismissal, Defendants assert that the Maryland courts have not adopted section 389, and that Count III fails to state a claim upon which relief can be granted. It is true that the Maryland Court of Appeals has not adopted section 389, however it has not rejected section 389 either. The most recent statement from the Maryland Court of Appeals regarding section 389 appears in Vann v. Willie, 395 A.2d 492 (Md. 1978), in which the court noted that it had never applied section 389. Id. at 494-95. The Vann court found it unnecessary to decide whether to adopt section 389 in the case before it, however, because section 389 is predicated on the supplying of an unsafe product and the plaintiff had failed to introduce any evidence that the product at issue was unsafe. Id.**

The Maryland Court of Appeals has adopted section 388,[5] which is closely analogous to section 389. See, e.g., Eagle Picher Industries, Inc. v. Balbos, 604 A.2d 445, 454 (Md. 1992). As other courts have noted, section 389 is simply a statement of basic negligence principles as they apply in the supplier context, and carries with it all of the proof problems associated with a negligence action. Buckingham, 713 A.2d at 385. Moreover, many courts which have adopted section 388 have also adopted section 389, when confronted with an appropriate case. See id. at 384-86; Readenour v. Marion Power Shovel, 719 P.2d 1070, 1076 (Ariz. Ct. App. 1985);

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[5]Section 388 provides that:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to sue the chattel with the consent of the other or to be endangered by its probably use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
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> (a) knows or has reason to know the chattel is or is likely to be dangerous for the use for which it is supplied, and
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> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
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> (c) fails to exercise reasonably care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Hammond v. North Am. Asbestos Corp., 435 N.E.2d 540, 546 (Ill. App. Ct. 1982); Ikeda v. Okada Trucking Co., 393 P.2d 171, 177 (Haw. 1964); Moody v. Martin Motor Co., 46 S.E.2d 197, 199-200 (Ga. Ct. App. 1948).

In light of this precedent and the Maryland Court of Appeals' adoption of the closely analogous section 388, the Court predicts that, given an appropriate case, Maryland's highest court might adopt section 389 of the Restatement (Second) of Torts. The Court believes that further development of the facts will aid in a determination of whether the instant case presents an appropriate situation for the application of section 389. Because the Court cannot conclude, at the current stage of this litigation, that Plaintiffs could prove no set of facts which would entitle them to relief under section 389, dismissal of Count III will be denied.

C. Nuisance - Count VI

Count VI of the First Amended Complaint is premised upon Defendants' processing, marketing, promotion, advertising, selling, distribution and delivery of lead pigments and lead paint for application on exterior and interior surfaces of the Plaintiffs' homes. First Am. Compl. at p. 114 ¶ 336.

**Plaintiffs allege that Defendants' conduct resulted in the contamination of at least one million residences in Maryland, and rendered those residences unfit for habitation by children and pregnant women. Id. at p. 114 ¶¶ 337-38. Plaintiffs contend that Defendants' actions resulted in both a public and private nuisance, in that the presence of lead paint unreasonably and unlawfully interferes with the Plaintiffs' use and enjoyment of their residential premises and causes a substantial diminution in the market value of their homes. Id. at p. 114 ¶¶ 338-39.**

**Defendants contend that the First Amended Complaint fails to state a claim for either public or private nuisance because Plaintiffs have failed to allege that the condition complained of arose from outside of the Plaintiffs' property and because the Defendants lack control over the instrumentality, namely the lead pigments, from which the nuisance is alleged to arise. In addition, Defendants claim that the Plaintiffs' claim for public nuisance fails because Plaintiffs have failed to identify any "public right" that the Defendants' alleged conduct interferes with, and because Plaintiffs do not and cannot allege that they have suffered from special damages.**

**The Maryland Court of Appeals has adopted the Restatement (Second) of Torts' definitions of both public and private**

nuisance. A private nuisance is defined as "a non-trespassory invasion of another's interest in the private use and enjoyment of land." Rosenblatt v. Exxon Co., 642 A.2d 180, 190 (Md. 1994) (quoting Restatement (Second) of Torts § 821D). In Maryland, strict liability standards, as opposed to negligence standards, apply to a claim for private nuisance. Washington Suburban Sanitary Comm'n v. CAE-Link Corp., 622 A.2d 745, 758 (Md. 1993). The Restatement defines a public nuisance as "an unreasonable interference with a right common to the general public." Tadjer v. Montgomery County, 479 A.2d 1321, 1327 (Md. 1984) (quoting Restatement (Second) of Torts § 821B).[6]

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[6]Section 821B goes on to state that:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
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> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public

No Maryland court appears to have addressed the question of whether a plaintiff has a claim for private or public nuisance against a manufacturer or seller of a product that poses a hazard when applied to the plaintiff's property. It is clear that Maryland law does not recognize the right of a subsequent occupant of land to bring an action in private nuisance against a prior occupant for activities conducted on the land during the prior occupancy. Rosenblatt, 642 A.2d at 190-91. The Maryland Court of Appeals has rejected such a claim because "a cause of action for private nuisance requires an interference with a neighbor's use and enjoyment of the land."[7] Id.

It follows, as the Defendants argue, that under Maryland law, the alleged nuisance must emanate from a source outside of the plaintiff's property. Tadjer, 479 A.2d at 1328 ("There is no allegation in the third-party declarations that any land of the original plaintiff was in any way invaded. Thus, a claim for a private nuisance is not made out."); see e.g.,

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right.

[7]Plaintiffs distinguish Rosenblatt on its facts. Although the case involved a different factual scenario, the Maryland Court of Appeals' holding that a cause of action for private nuisance requires the interference with a neighbor's use and enjoyment of land is equally applicable to the facts of the case at Bar.

**Valencia v. Lee, 55 F. Supp. 2d 122, 134 (E.D.N.Y. 1999) (no claim for nuisance based upon presence of lead paint in plaintiffs' own apartment). The idea of a wrongful use of property is central to the legal concept of a private nuisance. Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 87 at 619; see Detroit Bd. of Ed., 493 N.W.2d at 521. In the case at Bar, there is no allegation that Defendants have wrongfully used any property. Rather, the alleged nuisance exists on, and emanates from, the Plaintiffs' own properties, and cannot form the basis for a private nuisance claim.**

**Moreover, an action for either public or private nuisance requires the plaintiff to plead and prove that the defendant has control over the alleged nuisance. See East Coast Freight Lines v. Consolidated Gas, Elec. Light & Power Co. of Baltimore, 50 A.2d 246, 254 (Md. 1946); Callahan v. Clemens, 41 A.2d 473, 475 (Md. 1945); see generally 58 AmJur 2d, Nuisances, §§ 117, 123. This principle has been reiterated again and again by courts considering nuisance claims against asbestos manufacturers, and has resulted in a universal rejection of such claims.[8] For example, after noting that**

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**[8]See Tioga Pub. Sch. Dist v. United States Gypsum Co., 984 F.2d 915 (8th Cir. 1993); Appletree Square I Limited Partnership v. W.R Grace & Co., 815 F. Supp. 1266, 1274 n.13**

nuisance has at times "meant all things to all people," the Eight Circuit in Tioga Pub. Sch. Dist v. United States Gypsum Co., 984 F.2d 915 (8th Cir. 1993), found that "nuisance law does not afford a remedy against the manufacturer of an asbestos-containing product to an owner whose building has been contaminated by asbestos following the installation of that product in the building." Id. at 920. The Tioga court relied on a number of decisions from other jurisdictions which noted that liability for nuisance turns on whether the defendant has control over the instrumentality alleged to constitute a nuisance, and found that a defendant who sold asbestos to a plaintiff lacked control over the product after sale. Id. In the particular context of Plaintiffs' nuisance claims, the Court finds the asbestos situation to be analogous to that involved in the case at Bar. It is indisputable that

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(D. Minn. 1993); Roseville Plaza Limited Partnership v. United States Gypsum Co., 811 F. Supp. 1200, 1210 (E.D. Mich. 1992); City of Manchester v. National Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986); County of Johnson, Tennessee v. United States Gypsum Co., 580 F. Supp. 284, 295 (E.D. Tenn. 1984); Town of Hooksett Sch. Dist. v. W.R. Grace & Co., 617 F. Supp. 126, 133 (D.N.H. 1984); Detroit Board of Ed. v. Celotex Corp., 493 N.W.2d 513, 520-22 (Mich. Ct. App. 1992); City of San Diego v. U.S. Gypsum, 35 Cal.Rptr.2d 876, 882-84 (Cal. Ct. App. 1995). But see Northridge Co. v. W.R. Grace & Co., 556 N.W.2d 345, 351-52 (Wisc. Ct. App. 1996) (allowing nuisance claim against asbestos manufacturer to proceed based on Restatement (Second) of Torts §§ 822 and 834 comment g, both of which have been rejected by the Maryland Court of Appeals).

**the Defendants in the instant case lack control over the lead containing products that are alleged to constitute a nuisance. Plaintiffs do not allege otherwise.**

**After examining the cases cited by the Plaintiffs in support of their nuisance claim, the Court concludes that none of them support an extension of either public or private nuisance to reach the allegations of the First Amended Complaint. All of the cases relied upon involve the application of the nuisance doctrine within its traditional confines, and none of them indicate that the Maryland Court of Appeals would do away with the traditional requirements that a nuisance emanate from outside of the plaintiff's land and that the nuisance-causing instrumentality be within the exclusive control of the defendant.[9]**

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**[9]See, e.g. Tadjer v. Montgomery County, 479 A.2d 1321 (Md. 1984) (landfill upon which a methane explosion occurred); Bishop Processing Co. v. Davis, 132 A.2d 445 (Md. 1957) (nauseating odor emanating from plant); Gorman v. Sabo, 122 A.2d 475 (playing of a loud radio); Adams v. Baltimore Transit Co., 100 A.2d 781 (Md. 1952) (wrongful blocking of a road); Hart v. Wagner, 40 A.2d 47 (Md. 1944) (neighbor's burning of trash); Cook v. Normac Corp., 4 A.2d 747 (Md. 1939) (erection of movie theater without required permits); Hoffman v. United Iron Metal Co., Inc., 671 A.2d 55 (Md. Ct. Spec. App. 1996) (noise, explosion and lead emitted from automobile shredding facility); Potomac River Ass'n v. Lundenberg Maryland Seamanship School, Inc., 402 F. Supp. 344 (D. Md. 1975) (defendants' dredging and filling of land along a creek which plaintiffs used for recreational purposes). Compare Bohon v. Feldstein, 113 A.2d 100 (Md. 1955) (landlord's improper installation of a water heater in apartment not a nuisance).**

**There are two additional reasons why Plaintiffs' public nuisance claim must be dismissed. In order to state a claim for public nuisance, plaintiffs must allege interference with a public right, Tadjer, 479 A.2d at 1327-28, and that they suffer from "some special and particular damage, different not merely in degree, but different in kind from that experienced in common with other citizens." Baltimore & Ohio R.R. Co. v. Gilmor, 94 A.2d 200 (Md. 1915). As the Restatement explains, "[c]onduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public." Restatement (Second) of Torts § 821B, comment g. The injury alleged by the Plaintiffs in the case at Bar is not common to all members of the general public, but rather, as plead, affects only those persons who own or occupy property which contains lead paint.**

**Even if the presence of lead paint in houses across the state of Maryland were viewed as affecting a public right, the First Amended Complaint fails to allege that the Plaintiffs suffer special damages. This case was brought as a putative class action on behalf of**

> [a]ll persons who own and occupy single-family, residential dwelling units situated within the State of Maryland which units were constructed no later than 1978 and which units either did or do contain lead paint.

First Am. Compl. at p. 26 ¶ 46. The First Amended Complaint contains no allegation that any of the named Plaintiffs, let alone any member of the putative class, suffers from damages which are different in kind from any other individual who is affected by the presence of lead paint in owner-occupied housing in the state of Maryland. To the contrary, the class allegations seem to foreclose any such claim in the instant lawsuit.

In sum, the Court concludes that Plaintiffs' First Amended Complaint fails to state a claim for either public or private nuisance. Count VI shall be dismissed.

D. Indemnification - Count VII

Under Maryland law, a right of indemnification can arise by express agreement or by implication. Hanscome v. Perry, 542 A.2d 421, 426 (Md. 1988). As Plaintiffs do not allege that an express indemnity agreement exists, the issue becomes whether an implied right of indemnification exists.[10] The law

[10]An implied right of indemnification may arise in two circumstances. The first, referred to as "implied contract"

will imply a right of indemnification when "[a] person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another." Id. at 617 (quoting Restatement of Restitution § 96). Only expenditures which are properly made in the discharge of such liability are recoverable. Id.

As the basis for Plaintiffs' indemnity claim, the First Amended Complaint alleges that Plaintiffs are legally obligated to disclose the presence of lead paint on their property, or to disclaim any representation or warranty as to the condition of their property, rendering their property unmarketable. First Am. Compl. at p. 116 ¶ 344. Defendants argue that Plaintiffs' indemnification claim fails as a matter of law because the First Amended Complaint does not allege that Plaintiffs have become subject to liability for Defendants' allegedly tortious actions. The Court must agree.

It is well settled that a claim for indemnification is derivative, and does not arise, unless and until the party seeking indemnification has paid an adverse judgment or

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or "implied in fact" indemnity, is based upon the special nature of a contractual relationship between the parties. Id. This type of indemnity is not alleged in the case at Bar. The second, referred to as "implied in law" indemnity, is based upon tort principles. It is this second type which the Court will discuss herein.

settlement. Read Drug v. Colwill Constr., 243 A.2d 548, 558 (Md. 1968). Plaintiffs have not alleged that they have suffered any loss by virtue of a settlement or satisfaction of a judgment. An indemnity claim might arise if and when one of the Plaintiffs were found liable in tort to a third person on account of the presence of lead paint in the Plaintiff's home. However, none of the Plaintiffs allege that they have been found liable to anyone for any claim arising out of the presence of lead paint on their properties.[11] Accordingly, the Court concludes that Count VI fails to state a claim for indemnification. Defendants are entitled to dismissal of Count VI.

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[11]Several other courts have dismissed indemnification claims similar to the one brought by Plaintiffs in the instant case. See, e.g., City of San Diego v. U.S. Gypsum, 35 Cal.Rptr.2d 876, (Cal. Ct. App. 1994) (asbestos); Town of Hooksett Sch. Dist. v. W.R. Grace and Company, 617 F. Supp. 126, 134 (D.N.H. 1984) (asbestos); City of Philadelphia, 1992 WL 98482 at * 11-12 (lead paint). The Court finds the reasoning of these decisions persuasive.

Defendants' motion predicted that Plaintiffs might attempt to rely on Md. Code Ann. (Real Prop.) § 10-702, which requires the seller of real property to disclose known hazardous conditions or to disclaim any warranties as to the condition of their property. Defendants argue, and the Court agrees, that this section does not provide the Plaintiffs with a right of indemnification against the Defendants. Plaintiffs' have wholly failed to address the applicability of this section to their indemnity claim, and the Court will assume that Plaintiffs have chosen not to pursue this theory of indemnification.

**E. Fraud/Deceit - Count VIII**

**Plaintiffs' fraud claims are premised upon the following alleged actions:**

> **Defendants . . . intentionally misrepresented their lead products . . . as safe for consumers to use in residential properties occupied by young children; and**
>
> **Defendants possessed access to and [had] unique knowledge of material facts associated with childhood exposure to lead particles and dust, which Defendants intentionally and maliciously concealed from all residential property owners and members of the public and those responsible to supervise young children.**

**First Am. Compl. at p. 117 ¶¶ 349-50. Thus, Count VIII appears to allege fraud under two alternative theories - fraudulent misrepresentation and fraudulent concealment.**

**In Maryland, a fraudulent misrepresentation claim requires proof of five elements:**

> **(1) that a false representation was made to the plaintiff;**
>
> **(2) that its falsity was either known to the speaker, or the misrepresentation was made with a reckless indifference to its truth;**
>
> **(3) that it was made for the purpose of defrauding the plaintiff;**
>
> **(4) that the plaintiff reasonably relied upon the misrepresentation; and**
>
> **(5) that the plaintiff suffered damage directly resulting from the misrepresentation.**

**Alleco, Inc. v. Harry & Jeanette Weinberg Foundation, Inc., 665 A.2d 1038, 1047-48 (Md. 1995) (collecting cases). A fraudulent concealment claim also requires a plaintiff to plead and prove five elements:**

> **(1) The defendant owed a duty to the plaintiff to disclose a material fact;**
>
> **(2) The defendant failed to disclose that fact;**
>
> **(3) The defendant intended to defraud or deceive the plaintiff;**
>
> **(4) The plaintiff took action in justifiable reliance on the concealment; and**
>
> **(5) The plaintiff suffered damages as a result of the defendant's concealment.**

**Green v. H&R Block, 735 A.2d 1039, 1059 (Md. 1999). Defendants argue that Plaintiffs' fraud claim, whether based on affirmative representation or concealment, fails as a matter of law because the First Amended Complaint does not allege that these Plaintiffs actually received any fraudulent misrepresentations, or that any information was concealed directly from them.**

**Defendants' contention is based upon their argument that under Maryland law, a party who is not the recipient of an allegedly fraudulent misrepresentation cannot state a claim for fraud, because he or she could not possibly have reasonably relied upon the statement. Parlette v. Parlette,**

596 A.2d 665, 669 (Md. Ct. Spec. App. 1990); Smith v. Rosenthal Toyota, Inc., 573 A.2d 418, 421 (Md. Ct. Spec. App. 1990); Columbia Real Estate Title Ins. Co. v. Caruso, 384 A.2d 468, 473 (Md. Ct. Spec. App. 1978). Plaintiffs contend that the Maryland courts have recognized a distinction between contract/fraud cases, such as those cited by Defendants, and product/fraud claims, and that direct reliance is not required under the latter type of case.

In support of their argument, Plaintiffs rely on the 19th Century Maryland decision in State v. Fox, 29 A. 601 (Md. 1894), in which the Maryland Court of Appeals stated, in dicta that:

> if a vendor sells any property which he knows to be imminently dangerous to human beings, and likely to cause them injury, to an innocent vendee, who is not aware of the danger, and to whom false representations have been made as an inducement to the sale, he may, under proper allegation and proof, be held responsible, not only to the vendee, but to such person or persons as the vendee may, in the ordinary course of events, call upon to take charge of the property for him.

Id. at 603; see also Maryland Nat'l Bank v. Resolution Trust Corp., 895 F. Supp. 762, 772 (D. Md. 1995). However, even under the Fox rationale, a plaintiff must still plead and prove that he or she personally relied upon the allegedly

fraudulent misrepresentation, even if it was received indirectly. See Smith, 573 A.2d at 421.

Plaintiffs also rely on a decision in City of New York v. Lead Industries Ass'n, Inc., Index No. 14365/89 (N.Y. Sup. Ct. Aug. 5, 1995) (Glen, J.), which allowed a fraud claim to survive a motion for summary judgment under circumstances similar to the case at Bar. The City of New York decision was based largely on an analogy to the "fraud on the market" theory which is typically recognized only in securities litigation cases brought pursuant to Rule 10b-5 of the Securities and Exchange Act.[12] Id. at 9, 30-36. This Court respectfully disagrees with Judge Glen's conclusion that the securities cases provide a useful analogy in the product/fraud context, and notes that most courts have refused to extend the "fraud on the market" concept from securities litigation to common law fraud actions.[13] There is no reason to suppose that

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[12]An earlier decision in the City of New York case, which is consistent with Judge Glen's decision, the New York Appellate Division stated that "[m]isrepresentations of safety to the public at large, for the purposes of influencing the marketing of a product known to be defective, give rise to a separate cause of action for fraud." City of New York v. Lead Industries Ass'n, 597 N.Y.S.2d 698, 700 (N.Y. App. Div. 1993).

[13]Coleman v. Danek Medical, Inc., 43 F. Supp. 2d 629, 635 n.4 (S.D. Miss. 1998) (stating that "no court has ever adopted a 'fraud on the market' type theory outside the securities fraud context, and that majority of courts which have had

**the Maryland courts would do otherwise, in fact, Maryland precedent is expressly to the contrary. See In re Medimmune, Inc. Securities Litigation, 873 F. Supp. 953, 968 (D. Md. 1995); Wright, Ct. of Spec. App. Slip Op. at 11 (stating that the fraud on the market theory is "completely contrary to Maryland law."); see also Griffin v. Medtronic, 840 F. Supp. 396, 397 (D. Md. 1994) (plaintiff in products liability action must establish that fraudulent misrepresentations were made to the person who is claiming injury from reliance on those misrepresentations).**

**Accordingly, the Court concludes that in order to state a claim for common law fraud under Maryland law, Plaintiffs must, at a minimum, allege that they personally received a misrepresentation indirectly, through a third party. An examination of the First Amended Complaint reveals no such allegation.**

**The First Amended Complaint attempts to state a claim for fraud on behalf of**

> **[a]ll persons who own and occupy single-family, residential dwelling units situated within the State of Maryland which units were constructed no later**

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**occasion to extent the theory to common law fraud have expressly declined to do so."); see, e.g., Chudasma v. Mazda Motor Corp., 123 F.3d 1353, 1369 (11th Cir. 1997); Appletree Square I Limited Partnership v. W.R. Grace & Co., 29 F.3d 1283, 1286-87 (8th Cir. 1994).**

than 1978 and which units either did or do contain lead paint.

First Am. Compl. at p. 26 ¶ 46. Plaintiffs' fraud claim alleges that Defendants intended that "residential property owners, members of the public and those responsible to supervise young children," rely on their misrepresentations, and that these persons foreseeably relied upon Defendants' misrepresentations. Id. at p. 118 ¶¶ 354-55. The proposed class, as alleged, necessarily includes both people who did receive the Defendants' allegedly false and misleading misrepresentations and people who did not.[14] Those members who did not receive Defendants' misrepresentations and those who cannot allege that information was concealed from them cannot state a fraud claim under Maryland law. Parlette, 596 A.2d at 669.[15] Some members of the proposed class may very well have

[14]Interestingly, the First Amended Complaint does not specifically allege whether any of the named Plaintiffs personally placed lead paint in their homes in reliance on Defendants' alleged misrepresentations, but instead simply states that their homes were constructed prior to 1978. See First Am. Compl. at p. 15-16 ¶¶ 22-27. The fraud claims are therefore defective even as to the named Plaintiffs, because there is no allegation that the Plaintiffs themselves personally relied upon any misrepresentation, or would have received any information that Defendants allegedly concealed.

[15]See Jefferson v. Lead Industries Assoc., Inc., 930 F. Supp. 241, 248 (E.D. La. 1996); Wright, Ct. Spec. App. Slip Op. at 10-12; Wright, Circuit Ct. Slip Op. at 11-14; City of Philadelphia, 1992 WL 98482 at *6; see also Appletree 29 F.3d at 1286 (proof of actual reliance required to establish fraud

viable fraud claims against the Defendants sued herein; however, Plaintiffs' have chosen to sue on behalf of a broad class of property owners, including many who cannot satisfy the elements of a fraud claim under Maryland law.[16] Accordingly, Plaintiffs' fraud/deceit claim will be dismissed.

F. Miscellaneous Arguments Raised by Individual Defendants

Asarco and Ethyl[17] argue that the First Amended Complaint fails to state a claim against them because they have never produced lead products. However, the Plaintiffs allege that

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in asbestos abatement action); Coleman, 43 F. Supp. 2d at 635 n.4 (S.D. Miss. 1998) (plaintiff must prove specific reliance in support of fraud claim); Medimmune, 873 F. Supp. at 968 (failure to plead actual reliance is fatal to common law fraud claim under Maryland law).

[16]In light of this conclusion, the Court need not address the parties' contentions regarding a manufacturer's duty to disclose discoveries relating to a product, the applicability of the presumption that a person will exercise due care for his own safety, or spoilation of evidence. The Court notes that Defendants' argument that they had no duty to disclose the hazards associated with lead paint to residential property owners as information became available is dubious, at best, given that under Maryland law, "one who suppresses or conceals facts which materially qualify representations made to another may be guilty of fraud." Finch v. Hughes Aircraft Company, 469 A.2d 867, 891 (Md. Ct. Spec. App. 1984) (citations omitted).

[17]PPG Industries' Motion to Dismiss did not present any arguments in favor of dismissal that have not been discussed herein.

**Asarco and Ethyl "mined, marketed, promoted, designed and/or manufactured [their] own lead products and promulgated, supported and/or promoted the production, marketing, designing and the manufacturing of the other defendants' lead products." First Am. Compl. at p. 23-24 ¶¶ 41-42. In the dismissal context, the Court must accept well-pleaded allegations as true and reject the contrary allegations of the opposing party. Moreover, the First Amended Complaint alleges that both Asarco and Ethyl served on the Board of Directors of the Lead Industries Association ("LIA"), and participated in the alleged "scheme" to conceal the hazards associated with lead paint from the public. Id. Claims relating to these allegations still remain pending against the LIA and other Defendants with whom Asarco and Ethyl are alleged to have conspired. Accordingly, they are not entitled to dismissal of any additional counts not already dismissed herein.**

**LIA and the National Paint and Coatings Association, Inc. ("NPCA") argue in their reply memorandum that LIA and NPCA are not for profit trade associations that never manufactured, produced, sold or distributed any commercial product, and contend that this precludes them from being held liable to the**

**Plaintiffs under a design defect theory.[18] LIA and NPCA cite one case, which held that the LIA could not be held liable for an allegedly defective product under Pennsylvania law. Swartzbauer v. Lead Industries Ass'n, Inc., 794 F. Supp. 142 (E.D. Pa. 1992).**

**No Maryland court appears to have addressed the issue of whether an entity other than a supplier may be held liable under a products liability or supplier negligence claim. The Swartzbauer court acknowledged that a strict liability claim against a trade association might be viable where there was an allegation that the industry delegated product safety and design functions to the trade association, which is alleged by the Plaintiffs herein. See id. at 144 (citing Hall v. E.I. DuPont De Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y.);[19] First Am. Compl. at p. 17 ¶¶ 30-31, p. 56-57 ¶ 146, p. 63-64**

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[18]**LIA and NCPA also make arguments pertaining to the indemnification, nuisance and fraud claims. Because the Court has already determined that these claims should be dismissed, the Court need not address these arguments.**

[19]**In Hall, Judge Weinstein of the United States District Court for the Eastern District of New York held that various manufacturers and trade associations which were involved in the blasting cap industry could be held jointly liable under negligence and strict liability principles under various joint liability theories. Id. at 370-80. The manufacturers were alleged to have (1) obtained their knowledge regarding the risks associated with the product from the trade association and (2) delegated at least some functions of safety investigation and design to the association. Id. at 375.**

¶¶ 172-73, p. 71-72 ¶¶ 195-97. Accordingly, LIA and NPCA are not entitled to dismissal of any additional counts not already dismissed herein.

## IV. CONCLUSION

For the foregoing reasons:

1. Defendants' Motion to Dismiss [Paper No. 24]; PPG Industries' Motion to Dismiss [Paper No. 26]; and Ethyl Corporation's Motion to Dismiss [Paper No. 27] are GRANTED in part and DENIED in part.

2. The following claims are DISMISSED:

   a. Count I (Negligent Product Design) insofar as it relates to lead pigment;

   b. Count IV (Strict Products Liability/Defective Design) insofar as it relates to lead pigment;

   c. Count VI (Nuisance);

   d. Count VII (Indemnification); and

   e. Count VIII (Fraud/Deceit).

SO ORDERED this 17th day of August, 2000.

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Marvin J. Garbis
United States District Judge